

**Aleksandar R. Ivanović**  <https://orcid.org/0000-0003-4627-6953>

International University of Novi Pazar (Republic of Serbia)  
Departement for Law Sciences (Assistant Professor)  
Faculty of Law Podgorica, University of Montenegro (Visiting Professor)

## THE RIGHT TO SOCIAL SECURITY IN THE CONSTITUTION OF THE REPUBLIC OF SERBIA

### Abstract

The author deals with the issue of constitutional protection of the right to social security in the Republic of Serbia. In this connection, the author first analyzes the provisions of the current Constitution of the Republic of Serbia which prescribing the right to social security. Subsequently, the scope of the material and personal rights of social security, which are guaranteed by the Constitution of the Republic of Serbia, are presented in the paper. Through analysis of two decisions of the Constitutional Court regarding the constitutionality of the provisions of individual laws pertaining to the exercise of these rights is presented impact of the constitutional regulations on the content of the social security rights in the legal system of the Republic of Serbia. In the second part of the paper author points on threats to social security rights in times of economic crisis according to actual state in Republic of Serbia. At the very end of the work, instead of the conclusion, the author deals with assessment of the future of social security rights in lights of the Serbian Constitution. Within that, author offers proposal of amendments to the Constitution of Serbia with the aim of improving the protection of social security rights through adequate prescribing of the right to social protection, as well as prescribing the right to housing.

**Słowa kluczowe:** prawo do zabezpieczenia społecznego, Konstytucja Republiki Serbii, ochrona, zagrożenia, wyzwania

**Keywords:** right to social security, Constitution of Republic of Serbia, protection, threats, challenges

ASCJ: 3308, JEL: K 31

### Introduction

The current Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia, no. 98/2006) was adopted in 2006 and it is the successor of the 1990 Constitution (Official Gazette of RS, no. 1/90) adopted by the Assembly of the Socialist Republic of Serbia at the time of the breakup of the Socialist Federal Republic of Yugoslavia (hereinafter referred to as: SFRY) and the existence of its Constitution of 1974 (Official

Gazette of SFRY, no. 9/74). The Constitution of 2006 was adopted under the pretext that the Republic of Serbia, after the exit of Montenegro from the State Union of Serbia and Montenegro, which made Serbia an independent and sovereign state, needed a new Constitution that would reflect its new state status. However, the reasons for its adoption are primarily of a political nature, and to the way in which it was adopted can be asserted a number of criticisms from the expert as well as the lay public.

The rapid procedure of constituting and adopting the Constitution resulted in the fact that the constitutional text itself contained many nomotechnical deficiencies, which created certain problems in the application of the Constitution. Also, with respect to the basic constitutional institutes, the Constitution of 2006 did not introduce much novelty in relation to the Constitution of 1990 (Marković 2006).

There were also no significant changes in terms of the provisions relating to the protection of social security rights. In this respect, what is said, in terms of protecting social security rights, in the Constitution of 1990, more or less could be also said for constitutional protection of social rights under the Constitution of 2006. However, as the Constitution of 2006 is currently in force in the Republic of Serbia, in the following we will strive to demonstrate the constitutional protection of social security rights in accordance with the provisions of this Constitution.

## **The constitutional guarantees of social security rights in Republic of Serbia**

Article 1 of the Constitution states that the Republic of Serbia: “Based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values”. Thus, in Art. 1, the Constitution defines the Republic of Serbia as a state based, *inter alia*, on social justice, which clearly indicates that it gives an important place to social security rights. In second chapter entitled “Human and Minority Rights and Freedoms” the Constitution elaborates the right to health and social protection, pension insurance, measures of affirmative action for those who, due to their particularly difficult situation, have less chances and the right to free tertiary education for successful and talented students with a lower property status.

The Constitution of the Republic of Serbia provides even greater protection of human rights in general, as well as social security rights as their important part, with its provision on the hierarchy of legal acts (Art. 194), which gives international treaties the supremacy over domestic laws. Namely, in the chapter entitled “Constitutionality and Legality” in Art. 194 of the Constitution of the Republic of Serbia stipulates that:

The legal system of the Republic of Serbia shall be unique (Paragraph 1). The Constitution shall be the supreme legal act of the Republic of Serbia (Paragraph 2). All laws and other general acts enacted in the Republic of Serbia must be in compliance with the Constitution (Paragraph 3). Ratified international treaties and generally accepted rules of the international law shall be part of the legal system of the Republic

of Serbia. Ratified international treaties may not be in noncompliance with the Constitution (Paragraph 4). Laws and other general acts enacted in the Republic of Serbia may not be in noncompliance with the ratified international treaties and generally accepted rules of the International Law (Paragraph 5).<sup>1</sup>

This means that originally a confirmed international treaty has a lower legal force than the Constitution, but greater legal force than the law, and second, the courts and other state authorities are obliged to apply the provisions the confirmed international agreements, thus providing citizens with comprehensive legal protection. For further purposes, Serbian citizens enjoy in front of all judicial bodies all social rights guaranteed by ratified international treaties, and among them is the special significance of the Revised European Social Charter (European Treaty Series, No. 163) of 1996.

As already pointed out in the introductory part of the paper, the Constitution of the Republic of Serbia, in accordance with the definition of a state, which is, among other things, the state of social justice, proclaims a certain number of social security rights, such as the right to protection of health, the right to social protection, right to pension insurance, special protection of the family, mother, single parent and child and the right to free tertiary education for successful and talented students with a lower property status. Therefore, in the following, we will present the provisions of the constitution guaranteeing these rights, and then point to their material and personal scope.

### **a) Right to health protection**

The right to health protection is prescribed in Art. 68 of the Serbian Constitution which stipulates that:

Everyone shall have the right to protection of their mental and physical health.

Health care for children, pregnant women, mothers on maternity leave, single parents with children under seven years of age and elderly persons shall be provided from public revenues unless it is provided in some other manner in accordance with the law.

Health insurance, health care and establishing of health care funds shall be regulated by the law.

The Republic of Serbia shall assist development of health and physical culture.

### **b) Right to social protection**

The right to social protection is prescribed in Art. 69 of the Serbian Constitution which stipulates that:

Citizens and families that require welfare for the purpose of overcoming social and existential difficulties and creating conditions to provide subsistence, shall have the right to social protection the provision of which is based on social justice, humanity and respect of human dignity.

---

<sup>1</sup> Available at: <http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution> (access: 21 March 2019).

Rights of the employees and their families to social protection and insurance shall be regulated by the law.

The employees shall have the right to salary compensation in case of temporary inability to work, as well as the right to temporary unemployment benefit in accordance with the law.

Disabled people, war veterans and victims of war shall be provided special protection in accordance with the law.

Social insurance funds shall be established in accordance with the law.

### **c) Right to pension insurance**

The right to pension insurance is prescribed in Art. 70 of the Serbian Constitution which stipulates that: „Pension insurance shall be regulated by the law. The Republic of Serbia shall see to economic security of the pensioners”.

### **d) Right to special protection of the family, mother, single parent and child**

The right to special protection of the family, mother, single parent and child is prescribed in Art. 66 of the Serbian Constitution which stipulates that:

Families, mothers, single parents and any child in the Republic of Serbia shall enjoy special protection in the Republic of Serbia in accordance with the law.

Mothers shall be given special support and protection before and after childbirth.

Special protection shall be provided for children without parental care and mentally or physically handicapped children.

Children under 15 years of age may not be employed, nor may children under 18 years of age be employed at jobs detrimental to their health or morals.

### **e) Right to free tertiary education for successful and talented students with a lower property status**

The right to free tertiary education for successful and talented students with a lower property status is prescribed in Art. 71 § 3 of the Serbian Constitution which stipulates that:

All citizens shall have access under equal conditions to higher education. The Republic of Serbia shall provide for free tertiary education to successful and talented students of lower property status in accordance with the law.

## **The scope of the material and personal social security rights guaranteed by the Constitution**

As for the right to health protection of Art. 68 of the Constitution, as one in the group of social security rights guaranteed by the Constitution, its material scope is not determined by the Constitution, but is explicitly directed to the law to regulate it (Art. 68 § 3) within the limits prescribed by the Constitution (Art. 18 § 2). Therefore, the right to health care has the status of legal right. This is stated in a compulsory constitutional provision that guarantees this right as well as the legal regulation of all important issues related to its realization, which the Constitution explicitly states (Art. 68 § 3). Based on the general wording in Art. 68 § 1 in relation with § 3 this article of the Constitution of the Republic of Serbia, the Law on Health Care (Official Gazette of RS, no. 107/2005, 72/2009, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013, 93/2014, 96/2015 and 106/2015; hereinafter referred to as: LHC).

The Law on Health Care is determined by the application of this article, in such a way that is precise the content of the right to health protection and the prescribed norms of the health care system, organization of the health service, social care for the health of the population, general interest in health care, the rights and obligations of patients, health care of foreigners, setting up of the Agency for Accreditation of Health Care Facilities of Serbia, supervision over the enforcement of this Law, as well as other issues of importance for the organization and implementation of health care. In the sense of this Law, health care is the organized and comprehensive activity of the society with the underlying goal to achieve the highest possible level of preservation of the health of citizens and families (Art. 2 § 1 LHC). Healthcare, within the meaning of this Law, includes (Art. 8 § 2 LHC):

- 1) preservation and improvement of health, detection, and control of risk factors influencing onset of diseases, acquiring of the knowledge and habits concerning healthy lifestyle;
- 2) prevention, control, and early detection of diseases;
- 3) early diagnostics, timely treatment, rehabilitation of the diseased and injured;
- 4) information needed by the population or individual for responsible actions and for exercising of the right to health.

The LHC, as the most important law on health care, stipulates that social health care at the Republic level consists of the measures of economic and social policies by which conditions are created for implementation of health care for the purpose of preservation and improvement of the health of people, as well as the measures by which the activity and development of the health care system are harmonized (Art. 9 LHC). Social care for health on the Republic level, in the sense, includes: a) establishing of the priorities, planning, adoption of special programs for implementation of health care, as well as passing of regulations in this area; b) implementation of measures of taxation and economic policies stimulating the development of healthy lifestyle habits; c) providing of the conditions for education concerning the health of the population; d) providing

of the conditions for development of an integrated health care information system in the Republic; e) development of scientific research and development activity in the field of health care; f) providing of the conditions for professional advancement of medical workers and medical associates.

The precondition for realizing the right to health care is certainly its financial basis, and health care is provided from the means of compulsory health insurance. Accordingly, the second law, which is also important in determining the scope of the right to health protection in accordance with the Constitution, is the Health Insurance Act (Official Gazette of RS, no. 107/05, 109/05, 106/06, 57/11, 110/12 and 119/12; hereinafter referred to as: HIA). This Act governs entitlements deriving from compulsory health insurance of insured persons and other citizens, being covered by compulsory health insurance, the compulsory health insurance organization and financing, voluntary health insurance and other issues relevant for the health insurance system (Art. 1 HIA). Health insurance in the Republic of Serbia is: compulsory and voluntary health insurance (Art. 2 HIA). Compulsory health insurance is the health insurance by which a right to health care and right to pecuniary compensations in the cases established by this Act are provided for insured persons and other citizens, being covered by compulsory health insurance (Art. 3 HIA). Compulsory health insurance is provided by and exercised through the Republic Health Insurance Institute and the Republic Institute organizational units, while certain compulsory health insurance issues are exercised through the Provincial Institute of Health Insurance as well in accordance with law (Art. 6 § 1 and 2 HIA). Funds for exercising entitlements deriving from compulsory health insurance are provided through health insurance contributions and other sources as well, in accordance with law (Art. 8 § 1 HIA). Compulsory health insurance includes: a) insurance covering diseases and injuries not related to work; b) insurance covering work-related injuries or diseases (Art. 9 HIA). Entitlements deriving from compulsory health insurance are as follows: 1) right to health care; 2) right to salary benefit for the period of temporary inability to work; 3) right to transportation benefit relating to the use of health care services. Entitlements deriving from health insurance are exercised only if due health insurance contributions have been paid, unless otherwise provided by the HIA (Art. 30 HIA).

In accordance with the principle of social justice, the Constitution determines, in principle, the state's obligation to assist the development of a health culture as well as the development of physical culture (Art. 68 § 4 of the Constitution), but does not define the content of the state's obligations in these areas. So the Constitution states that the Republic of Serbia shall assist the development of health and physical culture. However, the question arises as to how to understand the right which is prescribed herein. Execution of this obligation is not transferred to the law, probably because about the extent to which the state's obligations are on this basis can be decided by the Government. In this connection, one can ask why this position is in the Constitution at all. In this regard, there is an assumption that Constitution makers probably did this with the hope that the text of the Constitution as such will be more attractive to voters (at a referendum

to ratify the constitution), again with the hope that it will not be questioned how these right will be achievable.

The right to protection of physical and mental health (Art. 68 § 1) the Constitution guarantees as an individual right and broadly defines the circle of subjects that can use it in the sense that “everyone has the right” to this type of protection. For certain categories of persons, the right to health care from public revenues is guaranteed in particular. This right have children, pregnant women, mothers during maternity leave, single parent with children up to the age of seven. These persons enjoy the right to health care from public revenues provided unless it is provided in some other manner in accordance with the law (Art. 68 § 2). The law closely regulates the manner of exercising this right within the limits prescribed by the Constitution (Art. 18 § 2). This solution of the Constitution can boast, as the number of persons who receive health care from public revenues is increased. Therefore, from the cited norm, it can be seen that in relation to the previous constitutional solution, in addition to children, pregnant women and elderly persons, the health care provided by the Constitution was provided to mothers during maternity leave and single parents with children up to the age of seven (Rapajić 2015).

When the right to social protection under Art. 69 is in the question, the Constitution is not regulate closer content of the right to social protection, and therefore neither detailed prescribes its material scope, instead that in relation to this right, points to the legal regulations. Namely, the Constitution stipulates that, in accordance with the principle of social justice, as well as the principles of humanism and respect for human persons on which the social protection system is based (Art. 69 § 1 of the Constitution), the Constitution guarantees the right to social protection (Art. 69). The space for legal regulation opens a general constitutional provision that allows the possibility for the law to regulate the manner of exercising certain rights or freedoms, if it is necessary for the exercise of that right due to its nature (Art. 18 § 2), with the explicitly Constitution prescribed restriction that the law may not under any circumstances influence the substance of the relevant guaranteed right (Art. 18 § 2) (Pavjančić 2009).

In addition to the right to social protection from the Art. 69 § 1, the Constitution specifically guarantees the right to social security and insurance (Art. 68 § 2). The Constitution explicitly refers to the law to regulate these rights and the way in which they are exercised. The manner in which this guarantee is prescribed in the Constitution (“the rights of employees and their families to social security and insurance are regulated by law”) leaves an open question whether these rights are guaranteed by the Constitution in general, or the Constitution only authorizes a legislator to regulate these rights by setting constitutional basis for legal regulation (Pavjančić 2009).

The right to salary compensation in the case of temporary inability to work and the right to compensation during the period of temporary unemployment is guaranteed in principle by the Constitution (Art. 68 § 3). The conditions for acquiring rights, as well as their content and manner of realization are regulated by the law, on which the Constitution explicitly refers to, within the limits prescribed by the Constitution (Art.

18 § 2). At the end, the Constitution refers to the legal regulation of social insurance funds and their establishment (Art. 68 § 5).

When it comes to the personal scope of the right to social protection, according to the provisions of the Constitution, subjects of this right are citizens and families (Art. 69 § 1), provided they need help from the society in order to overcome the social and existential difficulties in which they have been found and to satisfy at least the minimum of their basic living needs (Art. 68 § 1).

The subjects of the right to social security and insurance (Art. 68 § 2) are employees and their families, while the subjects of the right – to salary compensation (Art. 68 § 3). Also, when it comes to the personal scope of the right to social protection in an Art. 68 § 4 of the Constitution provides for a provision that guarantees the special protection of disabled persons, war veterans and war victims. The law, which the Constitution explicitly refers to, regulates the frameworks and contents of the rights to special protection of these persons, the conditions under which these rights are acquired and subjects which can use these rights. The law can regulate these issues within the limits of which the Constitution prescribes (Art. 18 § 2). The rights to employees of the social security and insurance in the Constitution are not completely properly regulated. On the list of the social rights, from perspective of social justice, there is a demand to be prescribed following rights: the right to health care and other rights in the case of illness, the right in case of pregnancy, childbirth, reduction or loss of working ability, unemployment or age, and in the case of family members – the right to health care, the right to parental pension, but also the other rights based on social security. The right to social insurance is compulsory insurance of employees. Through it to employees and their families, social security is ensured, by the law. Social insurance has many aspects. The Serbian Constitution provides for three: the right of employees to salary compensation in the case of temporary inability to work; the right of employees to receive compensation in cases of temporary unemployment in accordance with the law (Art. 69 § 3); the right to pension insurance, strengthened with the obligation to take care about the economic security of pensioners (Art. 70) (Marković 2012). Regarding all rights related to social protection regulated by Art. 69 of the Constitution, unlike, for example, the right to economic security of pensioners (Art. 70), there was no determination of the obligations to the state in relation to ensuring the conditions for their realization. When is the right to salary compensation in case of temporary unemployment in the question, it comes to a little contradictory situation. In Serbian society, which in economic sense is characterized by a high rate of unemployment, this provisions benefits to people who are in favorable situation, to work even temporary, and the attitude does not take care of persons who are permanently unemployed and whom it is the help most needed (Rapajić 2015).

In accordance with the principle of social justice, as one of the basic principles on which the community is based, the Constitution in Art. 66 § 1 guarantees special protection of the family, and special protection is also guaranteed for certain categories of persons, among whom are mothers, single parents and children. The Constitution

does not regulate closely the content of special protection of the family, mothers, single parents and children, but only in principle prescribes that they enjoy special protection. The law regulates this protection more closely, as well as the manner of its realization within the frames and boundaries prescribed in the Constitution (Art. 18 § 2).

The special support and protection of mothers in the period before and after childbirth is generally guaranteed (Art. 66 § 2). The Constitution did not prescribe the content of this right nor the manner of its realization, nor did it instruct the law to regulate their issues. This blanket constitutional provision cannot be directly applied. Since the Constitution did not authorize the legislator to regulate special rights and the protection of mothers before and after childbirth, the exit could be sought in the application of a constitutional provision allowing the law to regulate human rights not only when the Constitution explicitly prescribes that, but even when if it “is necessary to exercise a specific right owing to its nature” (Art. 18 § 2), with the restriction that “the law may not under any circumstances influence the substance of the relevant guaranteed right” (Art. 18 § 2) (Pavjančić 2009).

Although it guarantees the rights of a child in a special article (Art. 64), the Constitution guarantees the rights of the child in other articles (example the right to citizenship in Art. 38), as well as the rights contained in this article (§§ 3 and 4). Among such rights are:

1) The right to special protection for children without parental care, as well as children with mental or physical disabilities (§ 3). The Constitution does not regulate the content of the right to special protection, nor does it refer to a law that would regulate it. In this case, Art. 18 § 2 may be the basis for regulation by law, but within the framework prescribed by the Constitution (Art. 18 § 2).

2) Prohibition of work of children under the age of 15 years (§ 4).

3) The right to work for a child under the age of 18 years, provided that the work does not harm him or his health or morals (§ 4).

The manner in which the Constitution regulates these rights of the child raises the question: by which reasons creator of the Constitution was led when decided to separate them from the corpus of absolutely protected rights of the child (Art. 64 and Art. 38 § 3), and to turn them into the regime of rights which are subject to deviations during the war or extraordinary condition?

Authors who are dealing with a topic of human rights criticize this approach in the regulation of social right. Namely, according to the authors who criticize this way of regulating the described social right, besides the obligation imposed on the legislator to provide special protection to the aforementioned categories of citizens, the creator of Constitution did not in principle predict the nature of this special protection or the goals that should be achieved. In this sense, this article represents only an empty proclamation whose sole legal effect is the obligation of the legislator to specifically regulate this issue. Thus, from the level of constitutional right, this special protection is transferred to the level of law right. The same remark can also be addressed when it comes to special protection of disabled persons, war veterans and war victims (Art. 69 § 4) (Simović, Avramović, Zekavica 2013).

Finally, as the last in the series of social security rights guaranteed by the Constitution of the Republic of Serbia, the right to free tertiary education to successful and talented students of lower property status. Namely, this right in Art. 71 § 3, guarantees by the Constitution as an obligation of the state to enable successful and talented students with a lower property status to acquire tertiary education. The content of these rights is more closely regulated by law, within the limits prescribed by the Constitution (Art. 18 § 2). In nomotechnical terms, this formulation of the constitution is not best written as it explicitly states that the education is “free”. Starting from the assumption that there are no free education, as well as free health care (because, in the end, someone has to pay for it), instead of the word “free” in the Constitution, it should have been “on the expense of the state” or “from public revenues” as it has done in Art. 68 § 2 (Health Protection). “Free” tertiary education, or education at the expense of the state, is drastically narrowed, in the sense of provisions of previous Constitution, as the state now allows it only to “successful and talented students with lower property status” (Art. 71 § 3) (Marković 2006).

## **The constitutional regulations’ impact on the content of social security rights in the legal system of Republic of Serbia**

The impact of the constitutional regulations on the content of the social security rights in the legal system of the Republic of Serbia will be demonstrated through two decisions of the Constitutional Court regarding the constitutionality of the provisions of individual laws pertaining to the exercise of these rights.

The first case is an initiative submitted to the Constitutional Court in 2011 year for initiating a procedure for reviewing the constitutionality of the provision of Art. 33 § 5 of the Health Insurance Act, which states that by the Law on Amendments to the Health Insurance Act (Official Gazette of RS, no. 57/11) have been introduced amendment of this law in the sense that: “as industrial accident do not consider injuries on arrival and departure from work and occupational diseases”, and that in before adoption of amendments to the Law, injuries at work were determined in accordance with the regulations on pension and disability insurance, according to which, injuries at work, are considered injuries at arrival and departure from work. The initiator pointed out that the right to salary compensation in the case of temporary inability to work is human right, guaranteed by the Constitution, and when its regulation is in the question there is need to bear in mind the system of law, as the Constitution refers to this in Art. 69 § 3, when it determines that the employee is entitled to compensation in case of temporary inability to work, in accordance with the law. In this sense, the Law of Contract and Torts (Official Gazette of SFRY, No. 29/78, 39/85, 45/89 – Decision USJ and 57/89, Official Gazette of FRY, No. 31/93 and Official Gazette of SCG, No. 1/2003 – Constitutional Charter) (so-called Law on Obligations) established the rules on the causality between the damage incurred and its compensation, and the initiator stated that there was a causal link between the performance of the work and the

injury that occurs during the arrival and departure from work, because employed in the working contract is obliged to come to work at a certain time, and even more is direct causal link between work and occupational diseases. The disputed provision of the Law, in the opinion of the initiator, also violates the constitutional principle of the equality of citizens under Art. 21 of the Constitution, since when it comes to injuries at arrival and departure from work, the HIA does not recognize the right to salary compensation, while the the Law on Pension and Disability Insurance (Official Gazette of the Republic of Serbia, No. 34/2003, 64/2004 – decision of the CCRS, 84/2004 – other law, 85/2005, 101/2005 – other law, 63/2006 – decision of the CCRS, 5/2009, 107/2009, 101/2010), in Art. 22 § 3, treats the same fact differently and recognizes in these cases the right to disability pension and the right to compensation for physical damage. Because of that, the initiator considers that the disputed provision of Art. 33 § 5 of the HIA is not in accordance with the provisions of Art. 21 and Art. 69 § 3 of the Constitution.

As stated in the introductory part of the paper by the Constitution of the Republic of Serbia it has been established that the human and minority rights included in the Constitution are applied directly, that the Constitution guarantees, and as such, directly apply human and minority rights ratified by international treaties and generally accepted rules of the international law. And that ratified international treaties and generally accepted rules of international legal practice are part of the legal order of the Republic of Serbia and that the ratified international treaties may not be in noncompliance with the Constitution, that laws and other general acts enacted in the Republic of Serbia may not be in noncompliance with ratified international treaties and generally accepted rules of international law (Art. 194 §§ 4 and 5).

Employment Injury Benefits Convention no. 121 of International Labor Organization (hereinafter referred to as: ILO), ratified by the Federal Executive Council regulation of 8 July 1964 year (Official Gazette of SFRY – International Contracts, No. 27/70) provides that:

National legislation on the insurance in cases of industrial accident and occupational diseases should protect all employees (including apprentices in the economy) in the private and public sectors, including co-operatives, and, in respect of the death of the breadwinner, prescribed categories of users (Art. 4 § 1).

The contingencies covered shall include the following where due to an employment injury: a) a morbid condition; b) incapacity for work resulting from such a condition and involving suspension of earnings, as defined by national legislation; c) total loss of earning capacity or partial loss thereof in excess of a prescribed degree, likely to be permanent, or corresponding loss of faculty; and d) the loss of support suffered as the result of the death of the breadwinner by prescribed categories of beneficiaries (Art. 6); each member shall prescribe a definition of “industrial accident”, including the conditions under which a commuting accident is considered to be an industrial accident, and shall specify the terms of such definition in its reports upon the application of this Convention submitted under Art. 22 of the Constitution of the ILO (Art. 7 § 1).

Starting from the fact that the Serbia by ratification of the International Labor Organization Convention no. 121 on benefits in the case of an accident at work and occupational diseases, undertook to prescribe in its legislation insured cases if they were due to an industrial accident or occupational diseases referred to in Art. 6 of the Convention, and that, under the provisions of Art. 7 § 1 of the Convention, to prescribe a definition of “industrial accident” that will contain conditions in which an accident that occurs during the arrival and departure from work is considered as an industrial accident, and that the provision of Art. 33 § 5 of the HIA is prescribed in contravention of the provisions of Art. 7 § 1 of Conventions, and that in the sense of § 5 of this Article as industrial accident do not consider injuries on arrival and departure from work and occupational diseases, the Constitutional Court has determined that the contrary provision of the Act is incompatible with the provision of Art. 7 § 1 of the Convention, and consequently with the provisions of Art. 194 §§ 4 and 5 of the Constitution, which stipulates that the international treaties and generally accepted rules of international legal practice are recognized as part of the legal regulation of the Republic of Serbia and that the laws and other general acts adopted in the Republic of Serbia may not be in noncompliance with ratified international treaties and generally accepted rules of international law. Consequently, the Constitutional Court of Serbia brought the Decision no. IUz-314/2011 (18 December 2012), which found that the provision of Article 33 § 5 of the HIA is not in accordance with the Constitution and the confirmed international agreement.

In the another case, the Constitutional Court were filed two initiatives to initiate a procedure for reviewing the constitutionality of the provision of Art. 142 § 4 and Art. 146 §§ 4 and 5 of the HIA (Official Gazette of RS, No. 107/05, 109/05, 106/06, 57/11, 110/12 and 119/12). Namely, in Art. 142 § 4 the HIA stipulates that:

The subsequent verification of the insurance document, that is, the health card or special document on the use of health care, can be done on condition that the insured person made a selection of chosen physician in accordance with this Law and the regulations passed for the implementation of this law.

By Art. 146 §§ 4 and 5 of the HIA stipulates that:

An insured person is obliged, during the first visit of a health institution to the primary level of health care within the work doing by chosen physician, and at the latest within six months from the date of obtaining the status of an insured person with this law, shall to choose the chosen physician. If the insured person does not select a chosen physician within the deadline referred to in Paragraph 4 of this Article, he has right only to receive emergency medical assistance until the election of the chosen physician in accordance with this Law.

In the preliminary proceeding, the Constitutional Court found in reference to the provision of Art. 142 § 4, and Art. 146 §§ 4 and 5 of the HIA, as controversial, set forth following constitutional-legal issues:

1) whether the selection of a chosen physician can, by this law, be prescribed as an obligation, or as a condition for the exercise of rights under compulsory health insurance;

2) whether there is an objective and reasonable justification to restrict (limit) the provision of health care for insured person to the extent that fits for level of paid health care and which is necessary in respect of his state of health, only because the insured person do not made the selection of the chosen physician and whether in this way is questionable the realization of the essential right to health care, which is established by the law on the basis of the constitutional guarantees to the rights to protection of physical and mental health;

3) whether an established legal restriction of the Constitution guaranteed protection of the rights of citizens on the protection of health, is in accordance with the goal and the purpose of health care on which achieved our country is obligated at international level;

4) whether the impugned provisions of the Law insured persons, which have not select chosen physician, have been brought into a significantly different position compared to other insured persons, contrary to the principle of equality under Art. 21 of the Constitution and Art. 1 Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Treaty Series, No. 177);

5) whether insured persons may, in respect of the enjoyment of rights in essentially can put in the position of persons for whom health insurance contributions are not paid at all (because for one and other are provides only emergency medical assistance);

6) whether by the disputed solutions is providing the equality of the legal system of the Republic of Serbia (Art. 4 and Art. 194 § 1 of the Constitution) in the field of health care, or whether the disputed provisions of the HIA makes questionable the basic principles of health care of insured persons established by this law, as well as by the LHC.

According to the Constitutional Court, by disputed provision of Art. 142 HIA is to a great extent narrowed or limited by the legally established rights of insured persons for the realization of health care, as stated by the submitters of the initiative, because to insured persons without fulfilling the prescribed conditions, are providing only the right to minimal health care in the form of urgent medical assistance. It is important to note that the funds for exercising the rights from compulsory health insurance, *ex lege* provide in advance by payment of contributions for compulsory health insurance, and that the payment of contributions was made “an initial and basic” condition for exercising the rights from compulsory health insurance. In addition, by disputed provisions of the HIA insured persons whom have not selected chosen physician, were placed in a significant difference position in relation to the insured persons that made the selection of the chosen doctor, since, in addition to emergency medical assistance, they can not exercise other rights based on health insurance, without regards for the need caused by their health condition. Furthermore, according to the disputed provisions of the HIA to the entitled insured does not provide health services which are already paid, and because of that they are placed into the same position as those for whom no health insurance contributions were paid at all or not paid in their entirety.

From all the foregoing and according to the Court's assessment, it follows that the selection of the chosen physician can not be prescribed by law as an obligation, respectively as a condition without which fulfillment there is no enjoyment of the rights under the health insurance, since the contributions for that insurance are paid in advance, and that the HIA, as a systemic law in this area, guarantees the right of the insured person to freely choose a health care institution and a physician to whom will exercise the right to health care. According to the Constitutional Court's assessment, there is no objective and reasonable justification to the insured person who did not make the selection of the chosen physician, by law, restrict the provision of health care to the extent that fits to the volume of paid health care and in level which is necessary in sense of his state of health, only for the reason that the person did not perform the selection of the chosen physician. The Constitutional Court considers that this affects the essence of the right to health care, which is as such established by law, and on the basis of the constitutional guarantee of the right to protection of physical and mental health.

The Constitutional Court also assessed that prescribing of certain consequences for insurance that do not make selection of the chosen physician, does not only affect the essence of this right, but the insured is in fact punished, respectively deprived of the possibility of using health care services. In other words, the Court found that by disputed Art. 142 and 146 of HIA proclaimed freedom for choice of physician has essentially been transformed in an obligation of election, which non-execution is sanctioned by suspending the right to health care. From the everything above follows that by disputed provision of the Law brought in the question Art. 18 of the Constitution, which provides that the directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws. The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right.

Also on this occasion, the Constitutional Court pointed to the violations of provisions of Art. 20 of the Constitution, according to which human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right (§ 1). And that when restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means (§ 3). In relation to all of the above, the Constitutional Court specifically points to violations of the principle of proportionality in prescribing the stated manner and conditions for exercising the right from health insurance which is guaranteed by Constitution (Art. 20 § 3) as well as by international agreements. Namely, the Constitutional Court takes this position because it considers that the failure to fulfill the obligation to select the chosen physician could be sanctioned on other way, or with

a smaller extent of the restriction of the right to health care. In other words, according to the Court's judgment, in the concrete case, the goals or consequences are unjustified, there is no proportionality between the taken measure and the objectives that should be achieved by this measure. The Constitutional Court also assessed that by the prescribing that the Republican Health Insurance Fund has been authorized to subsequently do not verify the insurance document, that is, the health card or special document on the use of health care, if they don't select a chosen physician brought in the question realization of basic principles of the protection rights of insured persons and the protection of the public interest guaranteed by Art. 68 of the Constitution and Art. 12 of International Covenant on Economic, Social and Cultural Rights (ICESCR).

Also, according to opinion of Constitutional Court by the disputed provisions of the HIA insured persons, which have not selected a chosen physician, have been brought into a significantly different position compared to other insured persons, contrary to the principle of equality under Art. 21 of the Constitution and Art. 1 Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

And finally, in this case the Constitutional Court has the view that by the disputed provisions of the HIA have been violated and the unity of the legal order of the Republic of Serbia which is guaranteed by the provisions of Art. 4 and Art. 194 § 1 of the Constitution in the field of health care, because in this way are brought in the question the basic principles of health care and the rights of insured persons determined by this Law, as well as by the LHC. Based on the foregoing, the Constitutional Court, on the basis of the provisions of Art. 42a, § 1, Item 2 and Art. 45 Item 1 of the Law on the Constitutional Court (Official Gazette of RS, no. 109/2007, 99/2011, 18/2013 – decision of Constitutional Court, 103/2015 and 40/2015 – other law) 9 October 2014 was made decision that are unconstitutional provision of the HIA according to which for the certification of health booklets is necessary that insured has a chosen physician, as well as imposing an obligation to perform the selection of the chosen physician, as well as narrowing the scope of the right to health care in the case that insured do not perform the selection of the chosen physician.

## **Threats to social security rights in times of economic crisis**

Realization of social security rights depends on the economic and financial resources of a state. At the time of the economic crisis, various measures are being taken to mitigate the negative effects of the economic crisis on the state of the economy in one country. Consequently, beside the immediate economic effects on the business environment, these measures mainly affect the scope of the enjoyment of social security rights. This impact is most often negative in the direction of reducing the scope and content of the guaranteed social security rights (Vila 2014).

When it comes to the protection of social rights during the economic crisis in the Republic of Serbia, it should first be said that from the period of economic crisis that

occurred due to the disintegration of SFRY and the introduction of economic sanction by the international community during the nineties of the previous century, the situation with the protection of social security rights has been significantly worsened. Confirmation of this claim can best be seen through a high budget deficit, high unemployment rate, low growth in gross domestic product, a large brain drain, high corruption rates, a high percentage of undeclared employees, and so on. The mentioned conditions and phenomena that resulted from the economic crisis that has affected the Republic of Serbia since the nineties of the previous century are still threats to the protection of social security rights in the Republic of Serbia and during the global economic crisis from 2008 and onwards. In order to improve the economic situation, or to mitigate the consequences of the economic crisis, the Republic of Serbia has so far introduced a number of austerity measures, which directly or indirectly have the effect of reducing the scope and content of social rights. Therefore, in the next part of the paper we will point out some of them.

When it comes to the pension insurance system, that what is most worrying is the constant problem of high unemployment and a growing number of pensioners, so that now the ratio of working population and pensioners is 1.06:1. Because of that employees cannot earned enough to fulfill the need of a foundation for the payment of a pension. The very loose conditions for retirement from the nineties of the previous century (especially for the disabled) and the large presence of corruption have affected the grooving of the number of pensioners, especially disabled. Invalidity pensions have often approved without meeting the elementary conditions that prove the true presence of disability, making this institute as the substitute for early retirement. Also, there were too many conditions in the system for achieving a reduced service years for retirement (Petračković 2007).

Regarding the above problems Republic of Serbia first started in 2000 with the reform of the pension system, by lifted the age limit for retirement for men to 63 years, and for women to 58 years. At the same time, the minimum amount of the pension at the level of 20% of the average salary is guaranteed. Next reform in 2008 by which increases the age limit for retirement on 64 years for men and 59 for women (with at least 17 years of pensionable service) with predicted increasing in six months every next year, so that by 2011 the age limit for retirement will be 65 years for men and 60 for women (with at least 15 years of pensionable service). With last provisions on conditions for departure in retirement in 2017 for women age limit is raised in six months, which means that from 2017 women in Serbia will went in retirement with completed 61 years and six months and at least 15 years of pensionable service. Also, the age limit for retirement of women will gradually move until 2032, when women will go in retirement with 65 years of age, like it is condition for man's retirement, and at least 15 years of pensionable service. Also, one of the measures that had direct consequences for the protection of social rights in terms of the right to pension insurance is the reduction of pensions. Namely, the Law on Amendments to the Law on Pension and Disability Insurance (Official Gazette of the Republic of Serbia, No. 75/14) and the Law on Provisional Regulation of the Payment

of Pensions (Official Gazette of the Republic of Serbia, No. 116/2014 and 99/2016) in 2014, and due to the sustainability of the pension system, and therefore the budget of Serbia and the country's macroeconomic stability, prescribes reduction in pensions which amount exceeds 25,000 Dinars (which is about 208.33 Euros) for the period of next three years, that is, until December 2017. For pensioners whose income is greater than 25,000 and less than 40,000 dinars, the coefficient of reduction is 0.22 and for those who receive over 40,000 dinars, the coefficient of reduction is 0.25.

When it comes to healthcare, its availability is the main problem. Sustainability of the health sector has been compromised due to a poor financial situation in public health, which further worsened the decline in health insurance contributions in 2014. Another of the many major problems when it comes to health care is payment of health insurance. Namely, the state has not yet found an effective mechanism for combating the non-registration of workers, which in Serbia is in high level. Namely, a large number of workers in Serbia work undeclared, and their employers do not pay contributions for health insurance, which is why they are really in a bad position because they do not have the right to use health care. In that sense and with taking into account the poor state of the Serbian economy, it is difficult to expect that the state of health care will be improved soon.

As for the social protection, the same problems existing also here, and that is primarily the lack of financial resources, corruption and numerous abuses in the sense that social assistance is provided for those who do not have the right to it. In accordance with the above, the Government has taken certain measures in order to reduce the number of social assistance beneficiaries. These measures not only aim at the reform of the social protection system, but also the suppression of abuse in the field of financial social assistance. Namely, at the end of 2014 the Government adopted a regulation on measures of social inclusion of beneficiaries of financial social assistance. This regulation states that the state with the social assistance beneficiary concludes an "agreement on the active overcoming of his difficult social status", which implies the activities and obligations of the beneficiaries. Otherwise, it is stated that "the reduction and termination of the right to financial social assistance will be made in the case of improper non-performance of obligations". The regulation provoked sharp criticism from the professional public. The Protector of Citizens, as well as 57 other non-governmental organizations, independently submitted a proposal for review of the constitutionality of this decree in the Constitutional Court, but the Constitutional Court has not yet delivered its opinion. Of course, this measure can be justified from the aspect of social inclusion of social assistance beneficiaries, as well as from the aspect of suppressing abuse in this area of protection, but it is problematic from the aspect of endangering the right to social protection of people, because the beneficiary of social assistance should not work for what it already belongs to him because of the difficult social situation. Also, if a state provides them with a job, then they do not need to receive social assistance, but salary compensation.

## Assessment of the future of social security rights in lights of the Constitution

The protection of social security rights in the Republic of Serbia is in a very specific situation. Namely, in the Republic of Serbia, for decades, civil and political rights have been systematically endangered, which is why the main attention after the democratic changes in 2000 was focused on the protection of these rights, while the protection of social rights remained in the second plan. Also, high budget deficit, high unemployment rate, low growth in gross domestic product, a large brain drain, high corruption rates, a high percentage of undeclared employees, and so on, present major challenges for the Republic of Serbia and its system of protection of social security rights. In this regard, there is need in the future for taking measures of fiscal and monetary policies, as well as other measures. Some of these measures will certainly influence on the level of protection of social security rights, which will, as in the cases presented in the paper, be a subject of consideration before of Constitutional Court in the following period. In addition, it is very important that, when adopting such measures, the Serbian legislator abides by the constitutional principles of equality, proportionality and prohibition of reducing the level of achieved social security rights. In addition, from the aspect of the constitutional protection of these rights, certain amendments to the Constitution are necessary in the forthcoming period. The directions in which the Constitution of Serbia should be amended in terms of improving the protection of social security rights is reflected in more adequate prescribing of the right to social protection, as well as prescribing the right to housing.

Namely, as has already been pointed out in the paper, the issue of social protection is incompletely regulated by the provisions of the current Constitution. Also, in the provisions of Art. 69 of the Constitution exists terminological inconsistency. Namely, by the provisions of this Article, the right to social protection is guaranteed to the category of citizens and categories of family, employees and their families as third category, while special protection guarantees to persons with disabilities, war veterans and victims of war. Therefore, in an Article which defines general law, and not a special protection (which is defined in Art. 66), we have a guarantee of special protection according to these categories. All the above foregoing request the revision of constitutional provisions in the forthcoming period in order to provide a more precise and clearer guarantee of social protection in general, as well as special protection for certain groups.

The right to housing is guaranteed by many international legal documents and defined in different modalities. The International Pact on Economic, Social and Cultural Rights of 1966 emphasizes in Art. 11 that:

[...] the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Also Art. 31 of Revised European Social Charter prescribes that:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination; to make the price of housing accessible to those without adequate resources.

There is no clear provision in the Serbian Constitution on the right to housing. From the Art. 69 § 1 we can conclude that citizens and families which need assistance for overcoming social difficulties and creating conditions for meeting basic living needs shall have right to housing. However, having in mind the needs of the poorest social groups, it is necessary to anticipate changes in the Constitution and the right to housing for certain vulnerable categories of citizens.

## References

- Marković R. (2006) *Ustav Republike Srbije iz 2006 – kritički pogled* [2006 Constitution of the Republic of Serbia – a critical appraisal], “Anali Pravnog fakulteta u Beogradu”, vol. 54, no. 2, p. 5–46.
- Marković R. (2012) *Ustavno pravo* [Constitutional law], Beograd.
- Pavjančić M. (2009) *Komentar Ustava Republike Srbije* [Commentary on the Constitution of the Republic of Serbia], Beograd.
- Petraković D. (2007) *Reforma sistema penzijsko-invalidskog osiguranja u Srbiji* [Reform of the pension and disability insurance system in Serbia], “Industrija”, vol. 35., p. 29–46.
- Rapajić M. (2015) *Ekonomska i socijalna prava u Ustavu Srbije* [Economic and social rights in the Constitution of Serbia], “Zbornik radova Pravnog fakulteta u Novom Sadu”, vol. 49, no. 1, p. 273–298.
- Simović D., Avramović D., Zekavica R. (2013) *Ljudska prava* [Human rights], Beograd.
- Vila I. (2014) *Ustavnosudska zaštita ekonomskih i socijalnih prava u vreme ekonomske krize* [Constitutional court protection of economic and social rights during the economic crisis], “Pravni zapisi”, vol. 5, no. 1, p. 66–80.